IN THE

Supreme Court of the United States

October Term, 1943

No. 455

THE REPUBLIC OF MEXICO and

THE STEAMSHIP "BAJA CALIFORNIA" by the Republic of Mexico, as Owner,

Appellants,

vs.

R. B. HOFFMAN,

Appellee.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals of the United States and Brief in Support Thereof.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices Thereof.

Your petitioners, the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico as Owner, petition this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to have certified to you the record in the case of the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico as Owner, Appellants, vs. R. B. Hoffman, Appellee, No. 10475 in the United States Circuit Court of Appeals for the Ninth Circuit, and in respect thereto respectfully allege as follows:

A.

Jurisdiction is conferred upon this Court by Title 28, Section 347 United States Codes Annotated, Article III, Section 2, Clause 1, U. S. Constitution. The decision of the Circuit Court of Appeal for the Ninth Circuit dated June 30, 1944, was a final decision. "The Pesario," 225 U. S. 216.

The District Court of the United States, Southern District of California, Central Division, had assumed or acquired jurisdiction of the Steamship "Baja California," a vessel owned by the Republic of Mexico, where a fire occurred in Mexican waters in the harbor of Mazatlan, and as a result of maneuvers growing out of the fire which subsequently occurred, the appellee's ship was damaged and later sunk.

B.

Short Statement of the Case.

R. B. Hoffman, an individual, was the owner of the "Lottie Carson," a vessel of 234 tons net, which was fitted for fishing for sharks and had gone to the harbor of Mazatlan, Mexico, during October, 1941, for that purpose. During the morning of October 19, 1941, the "Lottie Carson" was lying at anchor in the harbor of Mazatlan, when the Mexican Steamship "Campeche" which had been lying at anchor in that harbor and farther out, and in a southeasterly direction from the "Lottie Carson," caught fire at about 11:00 A. M. The keeper of the port directed the "Baja California," a vessel of approximately 579 tons, owned by the Govern-

ment of Mexico, to tow the "Campeche" into the harbor. The "Baja California" proceeded to do so. During the course of the towing operations the "Campeche" went adrift, as a result of which the rudder of the "Campeche" struck the "Lottie Carson" on her port side, severely damaging the latter ship and cutting a hole in the planking of her side below the water line, resulting in the sinking of the "Lottie Carson." It was claimed that the "Baja California" was at fault, the libelant asserting that the "Baja California" let go the tow line which held the "Campeche," which was denied by the "Baja California."

All of these events took place within the port of Mazatlan, Mexico, within the three-mile limit of the shores of Mexico.

The "Baja California" is owned by and title is in the Government of Mexico. It is operated by the C. I. A. Mexicana de Navigacion del Pacifico S. de R. L. This company has a contract for the management and business operation of the steamship "Baja California." [R. 48.] The operating contract is for five years. [R. 60.] The government receives fifty per cent of the distributable profit. [R. 61.] Title at all times remains in the Government of Mexico. The ship carried on and is bound to carry on public service or forfeit the contract; the Mexican Government [R. 58] retained and retains ownership at all times.

At the outset of the suit the Republic of Mexico filed suggestions asserting its ownership of the vessel.

On December 15, 1941, R. B. Hoffman, appellee, filed a libel, No. 1961 V. H. in the District Court of the United States for the Southern District of California, Central Division, against the Mexican Government owned steamship "Baja California," which steamship was then in the friendly port of San Pedro, California, in Los Angeles Harbor. The libel was issued upon the steamer and it was arrested and taken into possession by the Marshal of the Court in the Harbor of Los Angeles. [R. 2-16, incl.]

On December 24, 1941, the Ambassador to the United States for the Republic of Mexico, Dr. Nejara, filed a suggestion by special appearance showing that the said steamship was at all times mentioned in the libel *owned* by the Republic of Mexico. [R. 19-21.]

On April 8, 1942, the Department of State transmitted to the Court its statement that it accepted as true that the "vessel is the property of the Mexican State." [R. 147-162.] This was accompanied by a suggestion from the Ambassador of Mexico, not only that the vessel was the property of the State, but that the occurrences took place in the port of Mazatlan, which would be close to the witnesses and the scene of the occurrences. Nevertheless, in the face of these statements and suggestions by the Mexican Government and declaration of the Department of State, the trial court assumed and asserted jurisdiction and proceeded against the Mexican Sovereign Government and the ship to judgment.

Issues Presented by This Petition.

1. May a vessel owned by a foreign government, holding title to that vessel and exercising dominion over it be the subject of an action *in rem* in the District Court of the United States?

2. Does the District Court of the United States have jurisdiction of a foreign government and its property, to-wit, a ship, when it anchors in a port of the United States, to libel and seize that ship for an accident happening in its own territorial waters and its own port?

3. Where title and dominion to a ship are in a friendly foreign power, and it is *in the public service of that country* but is operated by a corporation under what might be termed a "lend-leasing contract" for five years, is the ship subject to libel in a court of the United States, even though absolute ownership is in the government of the friendly nation itself?

4. Must the District Court of the United States accept as true the finding of fact of the Secretary of State that the vessel is owned by a friendly foreign power, and on the basis of this finding alone dismiss the action for want of jurisdiction?

5. Does a friendly foreign government waive its sovereign immunity by answering in a court of the United States on the merits, during which at all times it preserves the challenge to the jurisdiction of the court for want of sovereign immunity?

C.

Grounds for Granting a Hearing on the Writ of Certiorari.

The questions raised by this petition are new and of great importance to the various countries of the world today. The case involves:

1. The sovereign immunity of the Republic of Mexico, a highly friendly nation, in its title and ownership to one of its vessels.

2. The duty of the courts of the United States to pass upon the question of jurisdiction itself in the first instance, where title and ownership of a vessel are in a friendly foreign power.

3. Where the United States has loaned and leased millions of dollars worth of property in which the title remains in the United States, this case may set an important precedent in the seizure of our property to which the United States has title, in other harbors and ports of the world under the same or similar situations. The true meaning of "title" as giving sovereign immunity must be clearly defined.

4. Where the State Department assures the court that title and ownership of a ship are in a friendly foreign power, does it not become the duty of the District Court of the United States to immediately dismiss the proceedings for want of jurisdiction against that foreign power?

5. Where a foreign sovereign makes its appearance in a District Court of the United States, to defend and protect its title, does it by so doing waive its sovereign immunity?

6. Where an accident occurs in the port of a friendly foreign nation, in which a ship owned by that nation is involved, and within its own territorial waters, and its witnesses were all available and acceptable within that nation's court, should not the District Court of the United States dismiss the action and require the libellant to proceed in the court of the nation where the occurrence took place?

7. Where one judge of a District Court at the beginning of a case ruled against the question of sovereign immunity in the face of the suggestion of a foreign power, should this become the law of the case so as to preclude the foreign government from again raising the issue during the trial of the case? In other words, is the trial judge precluded from passing upon jurisdiction because at a preliminary hearing on the subject a former judge decided against the question of sovereign immunity?

8. Has sovereign immunity been presented so fully as to preclude further action except a dismissal of the case?

D.

Cases Believed to Sustain Jurisdiction and Cases and Statutes Relied on.

Title 28, Section 347, United States Codes;

The Navemar, 303 U. S. 68; 82 L. Ed. 667;

The Carlo Poma, 255 U. S. 220;

The Western Maid, 25 U. S. 419;

The Schooner Exchange, 7 Cranch, 11 U. S. 116;

The Davis, 10 Wall. 15;

Re Muir, 254 U. S. 522;

The Pesaro, 255 U. S. 216;

The New York, 256 U. S. 503;

The Pesaro, 271 U. S. 562;

United States v. Clark, 8 Pet. 436;

United States v. Lee, 106 U. S. 196.

Respectfully submitted,

MORRIS LAVINE,

Proctor for the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, its owner.

RAOUL MAGAÑA,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The District Court Erred in Failing to Release the Vessel Upon Proof of Title to the Vessel Being in the Government of Mexico.

It was established in the District Court that the vessel belonged to the Republic of Mexico. The Republic of Mexico laid claim to the vessel and appeared in court with the proper claim to ownership of the vessel. [R. 142, 143.] Thereafter the Republic of Mexico officially presented its claim of ownership to the Department of State. Sumner

Wells, Acting Secretary of the Department of State, informed the District Court:

> **"The Department accepts as true the statement that the vessel is the property of the Mexican State. This appears also to have been accepted by proctors for the libelant, as shown by paragraph (4) of the attached copy of a document which apparently was submitted to the court by them under the heading 'Analysis of the Note of the Honorable F. Castillo Najera.'"** [R. 149.]

The Republic of Mexico correctly stated its position and the law relative to the case, and the District Court erred in not accepting it. Its position was expressed as follows:

> "It is my Government's contention that, upon acceptance by the libelant of my Government's ownership of the vessel 'Baja California,' all *in rem* proceedings should have ended. Their continuation by the United States District Court was tantamount to placing my Government in the position of a party defendant in a legal action. In this respect, my Government contends that it is a rule of International Law—established beyond dispute—that the courts of a country are not empowered to implead a foreign sovereign." [R. 158.]

This is the doctrine of The Siren, 7 Wall. 74 U. S. 152, which holds that the soverign cannot be sued without his consent. The same exception extends to his property, and a claim *in rem* cannot be forced against the sovereign whose property is immune from seizure.

In *"The Western Maid,"* 257 U. S. 419-433, it is held that the personality of a public vessel is merged in that

of the sovereign. Therefore the immunity of a sovereign inheres in his public vessel.

In *Keokus v. United States*, 260 U. S. 125, it is held that sovereign property is exempt from seizure for a tort.

See also the following cases in support of the immunity of the sovereign:

Stanley v. Schwalvy, 147 U. S. 508;

United States v. Clarke, 8 Pet. 436, 444;

Belnap v. Schild, 161 U. S. 10;

Kawananakoa v. Polyblank, 205 U. S. 349;

The Schooner Exchange, 7 Cranch, 11 U. S. 116;

The Ricardo, 99 Fed. (2d) 935;

Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 Fed. (2d) 705, 708.

The Navemar, 303 U. S. 68, 82 L. Ed. 667, recognizes the doctrine of sovereign immunity as set forth and applicable to this case. However the District and Circuit Courts erred in its application of the principles of *The Navemar* case.

The courts below confused the ownership of a vessel with the operation and management thereof. Merely because a nation permits one of its corporations to operate its vessel does not change its right to the claim of sovereign immunity.

Questions closely akin to the present situation are contained in tax questions of property owned by the United States but operated by private corporations in various states in the development of war material. This court

has held such property exempt from *state taxation. U. S. v. County of Allegheny, Pennsylvania*, 88 L. Ed. 845.[1]

The Supreme Court said (88 L. Ed. 852):

> "We think, however, that the Government's property interests are not taxable either to it or to its

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[1]Mesta Machine Company, an appellant with the United States, exists as a corporation under the laws of Pennsylvania and has a manufacturing plant in the County of Allegheny, of that Commonwealth, the County being appellee herein. It is engaged in the manufacture of heavy machinery. In October, 1940, the War Department desired to produce a quantity of large field guns. *It could have assembled an organization, created a government-owned corporation, and erected a plant which would have been wholly tax immune. Clallam County v. United States*, 263 U. S. 341, 68 L. Ed. 328, 44 S. Ct. 121. But for reasons of time and policy it chose to utilize a going concern under private management and ownership. Mesta's plant was not equipped for the manufacture of ordnance. It was agreed that certain additional equipment specially required for the work should be furnished at Government cost and should remain the property of the United States.

The contract provided that title to all such property should vest in the Government upon delivery at the site of work and inspection and acceptance.

By the second title of the contract the Government leased this equipment to Mesta for the period during which guns are manufactured by it under this contract or later supplements. As rental Mesta agreed to pay the sum of one dollar. Liability of Mesta for loss, damage, or destruction of equipment was "that of a bailee under a mutual benefit bailment." Mesta could not remove any of it without permission, and at all times it was accessible to Government inspection. On termination of the gun-supply contract, unless a stand-by contract was made, Mesta agreed to remove and ship the equipment according to Government direction, in good condition subject to fair wear and tear and depreciation.

The Court further said in *United States v. County of Allegheny*, 88 L. Ed. 852:

> "We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands. The distinction between taxation of private interests and taxation of governmental interests, although sometimes difficult to define, is fundamental in application of the immunity doctrine as developed in this country."

bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. . . . In United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, this Court decided that improvements made upon lands to which the United States held title but which were put in possession of Indians for their benefit remained immune from taxation and that cattle, horses, and chattels purchased with the money of the Government and 'put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them' were likewise immune from taxation."

The Navemar Case, 303 U. S.

The facts in this case are easily discernible from the case of *The Navemar* and therefore present a cogent question for this court to decide. In *The Navemar* case the libellant was a corporation created under the laws of Spain but was domiciled, so far as domicile is possible to a corporation, in the United States with its affairs directed and controlled by its agents resident in the United States. The Steamship Navemar was under the Spanish flag, being registered in the port of Seville, Spain, which was not at any of the times material in that case under the jurisdiction or control of the Madrid government. For a number of years the Navemar had been owned and operated by the libellant, at no time during the period material to that litigation being in any Spanish port or within any Spanish territorial waters. She was engaged in the transportation of commercial

cargoes between New York and South American ports pursuant to that charter.

While the Navemar was in Argentine waters on a voyage which she was making pursuant to her charter the Spanish consul at Rosario and at Buenos Aires, without the consent of the ship's owner or master, endorsed on two of the vessel's documents (not including the bill of sale or any document of title) a statement that the property in the vessel had passed to the Spanish government by a *decree* issued in Madrid on October 10th, 1935 by the President of Spain. This decree was *ex parte*. It was a decree of expropriation. There was no evidence in the record excepting the bare statement of the Spanish consul as to the effect of the Spanish decree even under the laws of Spain. [Record of Navemar Case, October Term 1937, No. 242.]

Contrast this with the case of the Baja California. The Baja California is owned by the Mexican government and title was and is at all times during matters pending herein in the government of Mexico. (2) The government of Mexico at all times retained absolute ownership in the vessel. [R. 40, 50.] All liabilities in the case are against the sovereign government of Mexico. Mexico has even indemnified the government of the United States in connection with any possible judgment. (4) The vessel was at all times mentioned herein in the government service of Mexico. It was obligated to carry out routes determined by the navy of Mexico. [R. 51.] (8) It was obligated to transport the mail, the army, the navy, and political officers. [R. 52.] It had at all times mentioned herein the port facilities of the government of Mexico. [R. 54, 55.]

The navigation service was at all times under the sovereign control of the Mexican government. [R. 58-60.] The ownership of the vessel remained at all times in the government of Mexico. [R. 69-72.] The object of the contract with public service [R. 58, 1], no exercise of private ownership over the ship or goods used in the service was violated. [R. 58, 59.] The government retained power to replace the management and business control of the ship which it permitted the management to operate only. [R. 60.] At any time that the vessel was not properly operated the government of Mexico retained the title and right to remove the management at all times.

The development in this country of the doctrine of immunity of foreign vessels stems from *The Exchange*, 7 Cranch. 116. The question there presented was whether a French war vessel was subject to the jurisdiction of our courts. It was held not to be upon the principle that a ship of a foreign friendly nation which constitutes a part of its military force, which is under the command of the sovereign and which is employed for obviously national purposes, should not be subject *in invitum* to interference by our courts. That was thought necessary if the sovereignty of a foreign friendly government was to be adequately and fully recognized. Where the vessel is one of war, all the elements of ownership, possession and direct operation by the foreign government are combined, and the national or public character of its functions is indisputable. But the notion of a public purpose has been extended and immunity granted though the vessel is commercially engaged. *Berrizi Bros. v. Pesaro*, 271 U. S. 562; *Carlo Poma*, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219; *The Maipo*,

252 Fed. 627 (D. N. Y.). In the *Pesaro* case the vessel was owned, possessed and operated by the Italian government in the carriage of merchandise for hire. The advancement of trade and the acquisition of revenue incident to participation in commercial services was deemed a sufficient public purpose. In England, the trend has been liberal (*The Jassy* (1906) P. 230; *The Porto Alexandre* (1920) P. 30) and the entire doctrine of immunity has been influenced by the theory that an action against the foreign vessel is not only *in rem* but also *in personam* against the foreign sovereign. *The Parlement Belge*, 5 P. D. 197. Inability to implead the foreign sovereign is singularly emphasized in *The Jupiter* (1924) P. 236.

One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. *U. S. v. Rogers*, 150 U. S. 249; *The Scotland*, 105 U. S. 27; *Wilson v. McNamee*, 102 U. S. 574; *Crapo v. Kelly*, 83 U. S. 610; *E. B. Ward Jr.*, 17 Fed. 456 (C. C. La.)

The claim of the Mexican government of its ownership and public control of the Baja is borne out by the State Department and the concession of the libellant. The assertions of the State Department the courts are bound to accept as conclusive in this case. (*Oetjen v. Central Leather Co.*, 246 U. S. 297.)

Having title to the vessel and having dedicated it to the public service of Mexico, the government of Mexico must be regarded as immune from the processes of the American court.

Oetjen v. Central Leather Co., 246 U. S. 297;

The Adriatic, 258 Fed. 902 (C. C. A. 3);

Berizzi Bros. Co. v. Pesaro, 271 U. S. 562;

Briggs v. Light Boats, 11 Allen (Mass.) 157;

Hyde, International Law, Vol. 1, Sec. 256;

The Roseric, 254 Fed. 154 (D. N. J.);

The Parlement Belge, 5 P. D. 197;

See, Note, 31 *Columbia Law Review*, 660, 662;

The Jupiter (1924) P. 236;

Contra, The Attualita, 238 Fed. 909 (C. C. A. 4);

Long v. Tampico, 16 F. 491 (D. N. Y.);

Carlo Poma, 259 Fed. 369 (C. C. A. 2), rev'd on jurisdictional grounds, 255 U. S. 219;

The Beaverton, 273 F. 539 (D. N. Y.);

Cf. The Johnson Lighterage No. 24, 231 Fed. 365 (D. N. J.);

The Davis, 10 Wall. 15.

Justice Clarke quoted the doctrine in the following words in the *Oetjen opinion*, 246 U. S. 297, at page 303, 38 S. Ct. 309, 62 L. Ed. 726:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of

such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

See also:

U. S. v. Belmont, 85 Fed. Rep. (2d) 543.

The Circuit Court of Appeals for the Ninth Circuit took the view that there was no "pertinent distinction between the position of a government which has acquired title but not possession of a vessel and that of a government owning a vessel, of which by contract it has surrendered possession to a private corporation which is acting independently in a private enterprise."

However, the true facts of the Navemar make the distinction apparent.

The "Navemar" was merely attempted to be appropriated by edict of the Spanish government. It was not within the sovereign domain of the Republic of Spain, nor otherwise within its possession or *control*. It was in nowise in the public service of Spain, nor under any obligation to be. The occurrence that gave rise to the libel took place outside Spanish waters. The Spanish government had by edict attempted to seize the ship, then within the sovereign domain of the United States and thereupon to claim immunity from suit in the courts of the United States. [Record of the "Navemar," No. 242, October Term 1937.]

But in the case at bar the title and ownership of the vessel was at all times in the government of Mexico. It was at the time of the occurrences giving rise to the libel action, in the territorial waters of Mexico (Mazatlan) and under the direction of the Portmaster of Mazatlan.

The operating contract expressly reserved ownership at all times in the government of Mexico and was subject to cancellation at any time for nonperformance of its express terms and statutes among other things, requiring the vessel to be in and perform the public service of Mexico. The term of the contract was five years with the government sharing half the profits. The government of Mexico had at all times *ownership, dominion and control.* There was no attempt to appropriate it by an executive, *ex parte* decree, as in the case of the "Navemar" nor is there any question of title.

The "Baja California" must therefore be considered, constructively at least, as a part of the floating territory of the government of Mexico, whose flag she flew, whose property she was, and is, and whose ownership has been recognized as having at all times existed. As such it was immune from process of the courts of the United States.

But the District Court erred in holding that because it appeared in the American court to assert its sovereign immunity of its floating territory that it thereby waived its claim of immunity. The Republic of Mexico and the United States of America have a treaty of friendship and general relations by the terms of which, among each other, there is granted to the envoys, ambassadors, ministers, charges d'affaires and other diplomatic agents of each other, the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

Under this treaty it was entitled to make appearance in our courts to assert its jurisdiction and the lack of jurisdiction of the court below, and upon the estab-

lishment of ownership of the vessel in its government it was entitled to have a dismissal of the action below.

Changing governmental structures require new definitions to be given to old words and interpretations of sovereign immunity in the light of present day conditions.

The Republic of Mexico, our next door neighbor, and one of twenty-one nations of Latin America, in a friendly neighbor policy owns the vessel. This is conceded. It operates the vessel through one of its corporations—a creature of the State, and for a public purpose.

"Actual possession and custody of government property," says this court, "nearly always are in someone who is not himself the government, but acts in its behalf and for its purpose." *U. S. v. County of Allegheny*, 88 L. Ed. 853. As pointed out earlier in the case posession of government property is "always largely constructive."

But this does not relieve the doctrine of sovereign immunity. If this court should so hold, then the United States could not make claim for twenty-eight billion dollars worth of lend-lease material—owned by the United States but operated by others.

Another changed situation is State ownership of all property in some favored and friendly states. Our friendly ally, Russia, owns and possesses *all* property as a State. Under an identical situation, its ships would be state owned and operated. It could claim sovereign immunity while our friendly neighbor Mexico would be otherwise treated because of the operation of the ship by a corporation which can exist only in a democratic or free State. This interpretation of the law would put a penalty on democracy and on our friendly neighbors of

Latin America, and not give them the same favors, privileges, immunities and exemptions which are granted or shall be granted to the agents of the most favored nation.

In 1 Benedict on Admiralty (Fifth Edition) 296, it is said:

> "As the foundation of jurisdiction *in rem* is the seizure of the property, jurisdiction is refused where such seizure by the courts of one sovereign is a dispossession of another sovereign and consequently contrary to the courtesy of kings, that comity of nations, that mutual deference and concession, by which amicable international relations are deemed best maintained. The public interest is thus preferred at some cost of inconvenience to individuals and of postponement of private rights."

It is respectfully submitted that the sovereign property of Mexico was immune from seizure and the court below was without jurisdiction to render the decree against this friendly neighbor.

Wherefore, Appellant, The Republic of Mexico, and The Steamship "Baja California," by the Republic of Mexico, its owner, pray that this Honorable Court grant certiorari and reverse the judgment.

Respectfully submitted,

MORRIS LAVINE,

Proctor for the Republic of Mexico and the Steamship "Baja California" by the Republic of Mexico, its owner.

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